No. 18-481

IN THE

Supreme Court of the United States

FOOD MARKETING INSTITUTE,

Petitioner,

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* FREEDOM OF INFORMATION ACT AND FIRST AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENT

MICHAEL C. DORF
Counsel of Record
CORTELYOU C. KENNEY
MARK H. JACKSON
CAITLIN M. FOLEY
CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3890
michaeldorf@cornell.edu

Counsel for Amici Curiae

286557

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Statutes

Cited Authorities

Page

Legislative Authorities

Page

Page

Rules

Other

Page

INTERESTS OF *AMICI CURIAE*[1]

Amici are scholars specializing in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the First Amendment. The two areas are deeply intertwined. As Congress has explained: "Open government [is] . . . the best insurance that government is being conducted in the public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government." S. Rep. No. 93-854, at 1–2 (1974). "[F]reedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression." *Id.*

In recognition of these vital rights, *amici* respectfully submit this brief to underscore how the significant departure from precedent urged by Petitioner and its *amici* stands in stark contrast to the values laid out by Congress through its enactment of, and constant supervision over, FOIA. *Amici* will demonstrate how Petitioner and its *amici* have forgotten the bedrock lessons that FOIA history teaches. The Appendix lists the individual scholars.

SUMMARY OF ARGUMENT

Petitioner argues for sweeping changes to FOIA's test for disclosure of confidential commercial information

---

1. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. Both parties have given blanket consent to the filing of all *amicus* briefs.

under Exemption 4 used by all Courts of Appeals for the past forty-four years, beginning with *National Parks* in 1974. Acknowledging that FOIA does not define the term "confidential," the *National Parks* court held that the statute requires disclosure— notwithstanding a claim that the withheld records are confidential commercial information—absent a showing of either (1) impairment of the government's ability to obtain necessary information in the future; or, as relevant here, (2) infliction of substantial competitive harm to the information submitter. 498 F.2d 765, 770 (D.C. Cir. 1974). That test has withstood the test of time. Any change should come from Congress, rather than this Court, because of the unusual context of FOIA, and the unusual context of this case.

1. Unlike many other statutes, FOIA has been the subject of active interest from Congress. Through a series of twelve overhauls, Congress has made plain that it has an unwavering and increasing commitment to transparency, and an unhesitating willingness to cast aside Executive or judicial actions that set back this purpose. Congress was and remains keenly aware of the *National Parks* test and has repeatedly rejected calls from industry and other branches of government to alter or replace it since the test was first conceived. What is more, Congress not only failed to repudiate *National Parks*, but affirmatively based other, non-FOIA laws on the *National Parks* test, expressing its strong endorsement of, and indeed reliance on, the standard. The Court itself declined to overrule *National Parks* despite calls from the petitioner and the Chamber of Commerce to do so in its one and only case on Exemption 4, *Chrysler Corporation v. Brown*, 441 U.S. 281, 291 (1979)—a decision adopting a flexible approach to Exemption 4 based on the "the language, logic, [and] history" of FOIA as envisioned by Congress.

Post-*Chrysler*, this Court's sitting Justices have expressed the need to defer to Congress in the arena of FOIA. This Court should not change course now.

2. Even if this Court declines to follow *National Parks*, FOIA's clear congressional mandate in favor of transparency means that any standard that this Court adopts must favor transparency, not opacity. Two historic decisions, *Milner v. Department of the Navy*, 562 U.S. 562, 571–572 (2011), and *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973), *abrogated by statute as recognized in Central Intelligence Agency v. Sims*, 471 U.S. 159, 189 n.5 (1985), illustrate the flaws with Petitioner's reasoning. Specifically, they stand for the proposition that courts must interpret the scope of FOIA exemptions with a "narrow compass." Further, the judiciary cannot defer to the government (or for that matter, a private party) "because it says so"—which is essentially what Petitioner and its *amici* advocate. As these decisions demonstrate, Congress has unequivocally mandated that courts use their *de novo* and *in camera* powers of review, § 552(a)(4)(B), to scrutinize agency decisions by reviewing declarations attesting to the concrete harms disclosure would work and giving specific, non-conclusory reasons for withholding. Similarly, any standard that may replace *National Parks* should require courts to carefully examine the reasons for withholding and the harms resulting from disclosure.

3. Finally, this Court should not even reach the merits of this case. Congress in 2016 passed new FOIA amendments, which codified a "foreseeable harm" standard, § 552(a)(8)(A)(i)(I), requiring agencies to demonstrate concrete and specific wrongs resulting from disclosure. That standard is at least as protective as *National Parks*, if not more so.

Because the operative FOIA requests in this case predate the 2016 amendments, a decision here would only confuse lower courts as to the relevance of the "foreseeable harm" standard. To avoid this outcome, this Court should wait until the issue presents itself in a different case that properly raises the standard's legal effect, and only after the issue has percolated in the lower courts. After all, any benefit of deciding this dispute is negligible, because there are only nine pending cases in the lower courts that have the potential to involve *National Parks* with FOIA requests that predate the 2016 amendments (including one Administrative Procedure Act case). Thus, a decision is likely to work more harm than good, and this Court should dismiss the writ of certiorari as improvidently granted. In the alternative, the very least this Court can do is to make clear any adverse ruling has no bearing on the 2016 FOIA amendments because the issue is not presented in the briefing or on the facts of this case.

ARGUMENT

I. Active Congressional Supervision Shows It Is The Business Of Congress, Not This Court, To Modify What Has Been The Definitive Test For Exemption 4 Since 1974.

FOIA is an unusual statute and has been subject to active congressional oversight and an unwavering congressional commitment to transparency. When FOIA's transparency mandate has been disregarded either by the Executive or the judiciary, Congress has not hesitated to amend FOIA to underscore that FOIA must be construed in a manner favoring disclosure. Indeed, over the course of FOIA's over fifty-year history, Congress has amended the statute twelve times, each time to increase transparency,

including overriding Presidential vetoes to do so. It is against this backdrop of active oversight and focus on transparency that Congress's refusal to disturb the *National Parks* test must be viewed. This Court should not upend that long-standing history and precedent now.

A. FOIA Is An Unusual Statute Characterized By Active Congressional Oversight And An Unwavering Commitment To Transparency.

In responding to the lack of government accountability created by "the very vastness of our Government and its myriad of agencies," S. Rep. No. 89-813, at 3 (1965), Congress passed FOIA in 1966, Pub. L. 89-554, 80 Stat. 383 (1966). FOIA filled the void left by its vaguely worded predecessor, Section 3 of the Administrative Procedure Act. Whereas Section 3 contained several loopholes through which agencies could "deny legitimate information to the public," Congress designed FOIA to "establish a general philosophy of full agency disclosure." S. Rep. No. 89-813, at 3 (1965). In this way, FOIA "provides the necessary machinery to assure the availability of [g]overnment information necessary to an informed electorate." H.R. Rep. No. 89-1497, at 12 (1966). To ensure that "[t]he needs of the electorate" do not outpace "the laws which guarantee public access to the facts in [g]overnment," *id.*, Congress continually assesses whether FOIA indeed lives up to its goal of broad disclosure.

Over the course of FOIA's over fifty-year history, "Congress has repeatedly revisited the law to better balance the public's right to know." H.R. Rep. No. 114-391, at 8 (2016). For example, following the battle over the Pentagon Papers, the Watergate scandal, and the Court's decision in *Mink*, Congress sought to reinforce

FOIA's pro-transparency mandate. *See generally U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings Before a Subcommittee of the Committee on Government Operations*, 92nd Cong., 1st Sess. (1971); 120 Cong. Rec. 6811 (1974) (statement of Rep. Wright); *see infra* Part I.B. In exercising its oversight to correct Executive and judicial missteps, Congress held countless hearings, compiled numerous reports, and ultimately passed critical pro-transparency amendments with overwhelming bipartisan support. *See infra* Part I.B.-C.

Even today, Congress remains at-the-ready to defend FOIA's goal of broad disclosure. In 2015, the House Committee on Oversight and Government Reform—exercising its oversight over the Executive's use of FOIA—held hearings entitled "Ensuring Agency Compliance with the Freedom of Information Act," Serial No. 114-91, at 1 (June 3, 2015). The resulting 2016 amendments vindicated "'the people's right to know' about the activities and operations of government," and provided for a "clear presumption" in favor of "more disclosure of records, through both proactive disclosure and limitations on the use of exemptions." H.R. Rep. No. 114-391, at 8–9 (2016). Framed within this context of proactive vigilance, Congress's refusal to disturb *National Parks* is all the more striking.

B. Congress Has Clearly Articulated That Broad Interpretations Of FOIA's Exemptions Are At Odds With FOIA's Pro-Transparency Mandate.

Congress has not hesitated to amend FOIA to abrogate court decisions or executive actions that do not effectuate FOIA's goal of maximum transparency and

has made clear that courts may not rubberstamp agency action but must rigorously scrutinize the claims made by the government. The cautionary tale of *Environmental Protection Agency v. Mink* demonstrates that Petitioner's proposed interpretation of the word "confidential" stands in stark contrast to FOIA's pro-transparency mandate as articulated by Congress.

In *Mink*, the Supreme Court held, in clear contravention of Congress's original intent, that a district court had no power to review a classified record *in camera* for the purpose of segregating non-secret components from secret components withheld under Exemption 1. 410 U.S. at 81. The Court interpreted Exemption 1 broadly. Even though it covered only records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," *id.* at 81 (quoting 5 U.S.C. § 552(b)(1) (1970)), the Court held that whether a record was properly classified pursuant to the governing Executive order was not itself subject to judicial review. *Id.* at 84. Cherry-picking certain legislative history, the Court stated that the exemption tracked the language of Executive Order 10501. *Id.* at 82–83. According to the majority, this history "negate[d] the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter." *Id.* at 84 (italics added).

Three members of the Court vehemently disagreed, splitting the Court five to three.[2] Two members found

2. Justice Rehnquist took no part in the consideration of the case.

the Court's ruling was one in "flat defiance of [FOIA's] congressional mandate" and was an "inexplicable" "construction" of the plain language and history of FOIA that flew "in the face of [] overwhelming evidence of [] congressional design." *Id.* at 100–101 (Brennan, J., concurring in part and dissenting in part). They concluded that the majority's reading "wholly frustrate[d] the objective" of FOIA. *Id.* at 105. The effect of the ruling would mean the Executive could shield broad swaths of non-secret information simply by attaching that information to properly classified records, thereby evading judicial review. *Id.* at 97. According to the third member, this meant the government could "make even the time of day 'Top Secret.'" *Id.* at 110 (Douglas, J., dissenting).

Congress forcefully reacted to *Mink*. In its March 5, 1974 report, the House Committee on Government Operations noted that "[*i*]*n camera* inspection of the documents by the Court to determine if the information actually falls within the criteria of the Executive Order was specifically rejected by the Court in its interpretation of section 552(b)(1) of the Act." H.R. Rep. No. 93-876, at 7 (1974). Accordingly, the Committee proposed to grant courts discretion to use *in camera* review as a means for "look[ing] at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order." *Id.* This intention reflected the Committee's broader purposes—to "reach the goal of more efficient, prompt, and full disclosure of information." *Id.* at 5.

The Senate—despite brief pushback—also endorsed FOIA's goal of broad disclosure, releasing a nearly identical bill. An early Senate version directed courts to rule in favor of the government unless, following

in camera review, they found withholding "without reasonable basis" under an executive order's criteria. *See* S. Rep. No. 93-854, at 51 (1974). The Senate ultimately declined to incorporate this presumption, recognizing it undermined the purpose of the amendments to abrogate *Mink* through the implementation of more meaningful review. 120 Cong. Rec. 17022–25 (1974) (statements of Senator Muskie and Senator Kennedy); *id.* at 17031–32 (passing Senator Muskie's amendment by a vote of 56 to 29).

President Ford vetoed the bipartisan bill. Gerald R. Ford, *Veto of Freedom of Information Act Amendments*, 1974 Pub. Papers 374 (Oct. 17, 1974). But Congress was determined to reinstate a pro-transparency understanding of FOIA. The House voted 371 to 31 to override the veto. 120 Cong. Rec. 36633 (1974). The Senate agreed, overriding the veto by a vote of 65 to 27. *Id.* at 36882. The final text of the amendments, which remains good law today, provides that courts in reviewing agency actions must "determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions . . . and the burden is on the agency to sustain its action." § 552(a)(4)(B) (italics added).[3]

3. The 1974 FOIA amendments also changed the text of Exemption 1. Originally, Exemption 1 exempted records "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," 5 U.S.C. § 552(b)(1) (1970), to make clear that the courts should look behind classification labels. As amended, Exemption 1 covers records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such

C. Congress Has Made Clear Its Approval Of *National Parks*.

Not only has Congress expressed its commitment to transparency generally, it also has specifically endorsed the *National Parks* standard. Although the Court has previously relied on "unusually extensive legislative history" to reject interpretations that were never debated by Congress, *Chisom v. Roemer*, 501 U.S 380, 396 (1991), this Court need not even rely on such a canon here because Congress *has* explicitly considered the issue and has chosen to leave *National Parks*'s understanding of the scope of Exemption 4 undisturbed while relying on it in other statutes.

i. Congress Has Amended FOIA Ten Times Since *National Parks*, Actively Rejecting Calls To Eliminate Or Modify Its Standard.

As Petitioner itself acknowledges, Pet. Br. at 28, vocal opponents, including industry and other government actors, have been trying to do away with the *National Parks* test since the case was decided in 1974. Congress was well aware of this opposition, but chose to leave the standard intact, ignoring calls to modify Exemption 4 in the ten times FOIA has been amended since *National*

Executive order." 5 U.S.C. § 552(b)(1) (2012). In other words, the 1974 amendments were not just about *in camera* review, but also instructed courts to assess the government's purported claims of harm to evaluate if the government's explanations for withholding were compelling.

Parks.[4] Indeed, Petitioner's very test was skewered by the House Committee on Government Operations. In the words of the Committee:

> Ever since its first use, the substantial competitive harm test has been severely criticized by many businesses and corporate attorneys who would return to the "promise" or "expectation" test of confidentiality. Their arguments are not convincing. As discussed above, these tests have a very insubstantial basis in the legislative history, and are generally inconsistent with the language of the fourth exemption as well as the policy underlying FOIA.

H.R. Rep. No. 95-1382, at 21 (1978).

Three years after *National Parks*, subcommittee hearings were held exclusively on the scope of Exemption 4, including proposals to do away with the test. *See Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcommittee on Intergovernmental Relations of the Committee on*

4. *See* Pub. L. 93-502 §§ 1-3, 88 Stat. 1561–64 (1974); Pub. L. 94-409, § 5(b), 90 Stat. 1247 (1976); Pub. L. 95-454, Tit. IX, § 906(a)(10), 92 Stat. 1225 (1978); Pub. L. 98-620, Tit. IV, Subtitle A, § 402(2), 98 Stat. 3357 (1984); Pub. L. 99-570, Tit. I, Subtitle N, §§ 1802, 1803, 100 Stat. 3207, 3207 (1986); Pub. L. 104-231, §§ 3-11, 110 Stat. 3049 (1996); Pub. L. 107-306, Tit. III, Subtitle B, § 312, 116 Stat. 2390 (2002); Pub. L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8-10(a), 12, 121 Stat. 2525, 2526, 2527, 2530 (2007); Pub. L. 111-83, Tit. V, § 564(b), 123 Stat. 2184 (2009); Pub. L. 114-185, § 2, 130 Stat. 538 (2016).

Governmental Affairs, 96th Cong. 379 (1980) (describing 1977 hearings). Industry groups there advanced arguments strikingly similar to those now made by Petitioner, claiming in both oral and written testimony that Congress should "strike down the substantial competitive harm test of confidentiality." *Business Records Exemption of the Freedom of Information Act: Hearings Before a Subcommittee of the Committee on Government Operations*, 95th Cong. 157 (1977) (statements of Charles I. Derr). Witnesses complained that *National Parks* took "the test established by Congress and turned it on its head and made it a matter virtually impossible of proof." *Id.* at 158.

The Committee Report resulting from the hearings pointedly ignored these complaints and indicated that the "substantial competitive harm test . . . appear[ed] to be the best formulation [of Exemption 4] to date." H.R. Rep. No. 95-1382, at 2 (1978). The Committee further observed "[t]he rapid general acceptance of the substantial competitive harm test—the first confidentiality test based solely on objective and not subjective criteria—[was] strong evidence that the court in *National Parks* made a significant stride in dealing with the problems of confidential business information." *Id.* at 20–21. The Committee concluded that the *National Parks* test was not perfect, but firmly decided to leave it in place until the Supreme Court reached a decision in *Chrysler*. *See Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs*, 96th Cong. 379 (1980) (describing the 1978 House Committee's reaction); *see infra* Part I.D.

Post-*Chrysler*, Congress has chosen time and again to preserve the standard. In 1980, one year after *Chrysler*, a Senate Judiciary subcommittee report on its FOIA oversight hearings confirmed that "Congress intended [Exemption 4] to protect . . . financial or commercial information that is privileged and confidential," and required agencies to "balance the competitive interest of a business against the public's right to know vital health, safety, economic, and legal information," *Staff of the Subcommittee on Administrative Procedure and Practice, Senate Judiciary Committee*, 95th Cong., at 3 (Comm. Print 1980), an interpretation that runs directly counter to Petitioner's view of Exemption 4.

Again in 1981, the House Committee on Government Operations evaluated renewed critiques of *National Parks*, including proposed amendments to the text of Exemption 4. Industry groups repeated their arguments that *National Parks* "was—and is—wrong because it flatly contradicts the congressional intent that an agency was not to disclose information that 'would not customarily be made public by the person from whom it was obtained by the Government'" and railed that Congress had ignored industry's "repeated suggestions on this point." *Freedom of Information Act Oversight Hearings: Subcommittee of the House Committee on Government Operations*, 97th Cong. 877 (1981). One proposed amendment, H.R. 3928, would have made the "trade secrets exemption mandatory except . . . where the submitter [] consented . . . to disclosure" or where the agency could demonstrate an "overriding public interest in disclosure." *Id.* at 878.

Other heavy hitters joined in. The lead lawyer for Chrysler submitted extensive written and oral

testimony that *National Parks* contradicted the text and legislative history of Exemption 4, though he conceded the testimony they offered was "very much the same" as in the 1977 hearings that had rejected their pitch. *Id.* at 555 (testimony of Burt Braverman). Chrysler's lawyer called on Congress to "amend exemption 4" to "provide greater protection for confidential business information," *id.* at 555, or to "make clear that 'substantial competitive harm' is not the exclusive test of confidentiality" by providing that the confidential commercial information be made available "only if (1) there is no alternative source of information which can be disclosed without identifying the submitter, and (2) failure to disclose would seriously injure an overriding public interest," *id.* at 574. Another witness, a senior lawyer for Proctor & Gamble and author of a legal textbook on FOIA, argued that *National Parks* was a form of "judicial legislation" that harmed industry by making the burden to oppose disclosure too costly from a litigation perspective, and claimed it was "deserv[ing of] careful reexamination" when Congress considered amendments to FOIA in 1981. *Id.* at 600.

In the 1986 FOIA amendment hearings, this time the Chairman of the Administrative Conference of the United States—the "[g]overnment's in-house think tank on problems of administrative law and procedure"—attacked the *National Parks* test, claiming that "the proprietary interest of the submitter should carry a different kind of weight in the calculus," and arguing that "submitters should [not] have to show substantial harm, but simply that this kind of disclosure can reasonably be expected to impair legitimate interests, be they financial, commercial, research or business interests." *Freedom of Information Act Amendments of 1986: Hearing Before a Subcommittee*

of The House Committee on Government Operations, 99th Cong. 100–101 (1986) (evaluating a bill to amend FOIA, H.R. 4862). Despite these criticisms, the subcommittee conducting the hearings did not amend the bill to change the *National Parks* test in any way, though Congress did amend FOIA in 1986, leaving the *National Parks* test intact. Pub. L. 99-570. Congress subsequently amended FOIA five additional times, never altering Exemption 4. *See supra* note 4.

ii. Congress Passed Laws Relying On *National Parks*.

Since the 1980s, Congress not only has made clear that it does not intend to abrogate *National Parks*, but also has affirmatively interwoven the case's "substantial competitive harm" test into other legal contexts. Because *National Parks* is a workable standard of which Congress approves, later-enacted statutes incorporate Exemption 4—and its judicial gloss—rather than fashion new confidentiality rules. Indeed, a rejection of *National Parks* by this Court would produce ripple effects across a variety of laws that have incorporated Exemption 4.

For example, when Congress passed the Omnibus Budget Reconciliation Act of 1981, it explicitly stated its preference for applying the *National Parks* analysis to the Exemption 4 standard. The Act required the Consumer Product Safety Commissioner to offer manufacturers the opportunity to mark certain information as "confidential," defined to include any information that would fall within Exemption 4 of FOIA. Pub. L. 97-35, § 1204(6)(a)(4), 95 Stat. 357, 713 (1981). The House Conference Committee noted its intent to apply the *National Parks* test,

forbidding the disclosure of information that would "result in any significant competitive harm" to the company and providing factors for the "significant competitive harm" analysis. H.R. Conf. Rep. 97-208, at 877 (1981). The factors clearly indicated a rejection of the univeral test laid out by Petitioner and its *amici*, including weighing "whether the information would reveal to competitors operational strengths and weaknesses." *Id.* To protect business, Congress provided that the information submitter must be given "notice . . . [if] the commission considers such material to be outside the scope of confidential information," *id.* at 878—protections similar to agency-specific FOIA regulations that currently account for the concern that the *National Parks* test is insufficiently protective of industry.

The Federal Trade Commission (FTC) Improvement Act of 1980 provides another telling example. The Act classified certain line-of-business reports from individual firms as confidential information not subject to FOIA disclosure by the FTC. Pub. L. 96-252, § 3(a)(2), 94 Stat. 374 (1980). The Senate Report accompanying the bill noted the drafters' intent that "the standard for application of Exemption 4 apply here," citing *National Parks* and the "substantial competitive harm" test as the prevailing standard and further stating its intent to take "a similarly realistic view" to classification of confidential information. S. Rep. 96-500, at 10–11 (1979). Likewise, the Committee noted that "no conclusive formula" could be devised but included factors similar to those used by the Omnibus Budget Reconciliation Act. *Id.*

D. In *Chrysler v. Brown*, The Court Declined Calls To Abandon *National Parks*.

Chrysler presented the Court with a clear opportunity to modify or overturn the *National Parks* test, but in a unanimous opinion authored by then-Justice Rehnquist, the Court failed to even cite the case, relying on "the language, logic, [and] history" of FOIA to adopt a flexible approach to Exemption 4 and FOIA exemptions more generally. 441 U.S. at 290–291. *Chrysler* stands as a significant impediment to the Petitioner's reading of the word "confidential," and this Court would likely have to revisit portions of the opinion to adopt Petitioner's reading of FOIA—a path this Court should hesitate to take given the importance of *stare decisis*.[5]

Chrysler was a multifaceted case, but in the main involved an argument that FOIA Exemption 4 could be affirmatively invoked to justify withholding on behalf of a third party opposed to the government's decision to release information. In the first section of the opinion, *Chrysler* concluded that FOIA did not provide an affirmative cause of action for withholding. *Id.* at 290–294. The Court emphasized that it had "consistently recognized

5. The Court has made plain that while "[*s*]*tare decisis* is not an inexorable command . . . [r]evisiting precedent" is for the most part appropriate only "where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (Alito, J.). None of these factors weigh in favor of revisiting *Chrysler* given its longevity, the reliance of interests of FOIA requesters upon it, and its utter lack of negative treatment by this Court or any lower federal court.

that the basic objective of the Act is disclosure" to support its holding that the exemptions, including Exemption 4, are subject to a balancing test between "open government . . . [and] workable confidentiality in governmental decisionmaking." *Id.* at 290–292. As *Chrysler* explained, "[s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure," *id.* at 292 n.12 (quoting S. Rep. No. 89-813, at 3 (1965))—a reading in stark contrast to the universal rule proposed by Petitioner that has no flexibility.

Chrysler also failed to overturn *National Parks* despite calls to do so. Indeed, Chrysler's briefs read like a roadmap for Petitioner and its *amici* here—one that failed for Chrysler then and should fail again now. Although the lower court had not addressed *National Parks*, Chrysler asked the Court to eliminate it, citing the case no fewer than eleven times and arguing that the test was "contrary to both the express terms and the legislative history of the exemption." Pet. Br., *Chrysler Corp. v. Brown*, at 19 n.19 (June 5, 1978) (No. 77-922). Chrysler also claimed that predicting competitive harm was "highly speculative" and imposed an "extreme burden of proof" that required submitters to "undertake extensive economic analysis and employ expert witnesses." *Id.* Chrysler's reply brief struggled with the implicit ratification argument, claiming that just because the 1974 FOIA amendments did not touch Exemption 4, this did not mean Congress endorsed *National Parks*. Pet. Reply Br., *Chrysler Corp. v. Brown*, at 15–17 & nn. 17–18 (Oct. 30, 1978) (No. 77-922). Given that *National Parks* was decided shortly before the amendments, the argument that Congress had not implicitly ratified *National Parks* was at least colorable

then. Now, however, subsequent committee hearings show that Congress has actively considered altering this longstanding test and declined to do so.

In support of Chrysler, the Chamber of Commerce also asked the Court to overturn the *National Parks* test. It argued that the "substantial competitive harm" standard was "erroneous" and had "severely limited the effectiveness of the exemption in achieving the protection for business secrets that Congress intended," noting the decision had been heavily criticized by the business community. Br. of Chamber of Commerce as Amicus Curiae Supporting Pet., *Chrysler Corp. v. Brown*, at 23 n.77 (June 8, 1978) (No. 77-922). The Chamber warned the Court to "be aware of the pitfall of unintended approval" of the *National Parks* standard, yet the Court chose to leave the standard in place. *Id.*

E. This Court's Sitting Justices Have Recognized The Need To Defer To Congress's Judgment In The Arena Of FOIA.

This Court's sitting Justices have recognized the special need to defer to Congress's judgment in the context of FOIA. Writing for the panel, Justice Kavanaugh, then serving as a judge on the D.C. Circuit, held that a FOIA requester had exhausted its administrative remedies and could thus seek judicial redress when the government failed to inform the requester in a timely manner the scope of the documents it would disclose and withhold. *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 186 (D.C. Cir. 2013) (Kavanaugh, J.). Emphasizing the interlocking aspects of FOIA, then-Judge Kavanaugh explained how they

simultaneously "highlight[ed] and unravel[ed]," *id.*, the government's extremely anti-transparency stance that attempted "to keep FOIA requests bottled up in limbo for months or years on end," *id.* at 186–187. The holding "harmoniz[ed]" FOIA's "comprehensive scheme that encourages . . . agency accountability." *Id.* at 189. The opinion acknowledged the practical constraints FOIA imposed on agencies, but "Congress made that decision." *Id.* at 190. "If the Executive Branch does not like it or disagrees with Congress's judgment, it may so inform Congress and seek new legislation." *Id.* (citing *Milner*, 562 U.S. at 581).

Similarly, in *Department of Homeland Security v. MacLean*, 135 S. Ct. 913, 922–923 (2015) (Roberts, C.J.), Chief Justice Roberts, writing for the Court, explained that an analogy drawn between FOIA and an anti-leak law was inapt, recognizing certain "FOIA-specific factors." *Id.* The Court rejected MacLean's analogy between the two statutes because "they ha[d] different language, different histories, and were enacted in different contexts." *Id.* at 923. FOIA's unusual context is a crucial part of this litigation, and this Court should take that background into account in determining the scope of Exemption 4.

II. If This Court Does Modify *National Parks*, FOIA's Pro-Transparency Mandate Means Any Doctrinal Change Must Favor Transparency, Not Opacity.

This Court should not alter the *National Parks* test for the reasons articulated above. If it does, however, any test that replaces it cannot bear resemblance to those proposed by Petitioner or its *amici*, which violate the basic, pro-transparency tenet of FOIA. Two decisions, *Milner* and *Mink*, provide guidance, of what to do, and not

to do, respectively. Running from *Mink* through *Milner* is a constant theme—courts should not rubberstamp government determinations that an exemption applies. Although *National Parks* already strikes an effective balance between independent judicial scrutiny and the protection of third-party information, any standard that this Court creates should maintain meaningful judicial scrutiny over what information qualifies as "confidential."

A. *Milner* Shows That Any Plain Text Reading Must Favor Transparency.

The Court in *Milner* relied on FOIA's plain text to reject a test for Exemption 2, which deals with records "related solely to the internal personnel rules and practices of an agency." 562 U.S. at 564 (quoting § 552(b)(2)). Crucially different from this case, in *Milner*, the Court reached its holding because there was a clear circuit split as to the meaning of Exemption 2. *Id.* at 569. Furthermore, the legislative history was characterized by "dueling committee reports" with respect to the meaning of the word "personnel" and which of the starkly different tests used by lower courts Congress actually endorsed. *Id.* at 574. The Court therefore focused on the "clear statutory language" in light of FOIA's "goal of broad disclosure," and the "narrow compass" with which courts were directed to interpret FOIA's exemptions. *Id.* at 571, 574 (collecting cases). It replaced the challenged test for Exemption 2 with a pro-transparency standard named "Low 2." *Id.* at 571. The Court noted, pointedly, that a contrary decision would "ill-serve Congress's purpose by construing [the exemption] to reauthorize the expansive withholding that Congress wanted to halt" given FOIA's pro-transparency purpose. *Id.* at 571–572.

Importantly, unlike Petitioner's proposed test here, the "Low 2" test also did not arise from thin air but came from the Court's previous decision in *Department of Air Force v. Rose*, 425 U.S. 352 (1976), that had been twisted by lower courts in the service of withholding information more broadly than the *Rose* Court intended. Specifically, in describing Exemption 2, *Rose* held that the exemption "primarily target[ed] material concerning employee relations or human resources." *Milner*, 562 U.S. at 565 (discussing *Rose*, 425 U.S. at 363). *Rose*'s holding extended, according to the Court, only insofar as "the situation is not one where disclosure may risk circumvention of agency regulation." *Id.* at 566 (quoting *Rose*, 425 U.S. at 369). Undermining FOIA's goal of broad disclosure, the D.C. Circuit had adopted *Rose*'s "circumvention" caveat and created its own Exemption 2 interpretation in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981). Dubbing the interpretation "High 2," the D.C. Circuit extended Exemption 2 to shield "predominantly internal materials, whose disclosure would significantly ris[k] circumvention of agency regulations or statutes." *Milner*, 562 U.S. at 566 (internal citations omitted). The Court rejected the D.C. Circuit's departure from *Rose*, holding "that Low 2 is all of 2 (and that High 2 is not 2 at all[])," and noting that "[t]he statute's purpose reinforce[d] this [narrow] understanding of the exemption" given the well-established practice of "constru[ing] FOIA exemptions narrowly." *Id.* at 571.

The government also argued for the Court to adopt an even more expansive interpretation of Exemption 2 dubbed "Super 2." *Id.* at 577. The "Super 2" interpretation would have extended the exemption to "encompass[] records concerning an agency's internal rules and practices for its

personnel to follow in the discharge of their government functions." *Id.* The Court in rejecting the government's "Super 2" test observed it "would extend, rather than narrow, the APA's former exemption . . . which Congress thought allowed too much withholding." *Id.* at 579. "[N]eedless to say," the Court continued, the government's "reading of Exemption 2 violate[d] the rule favoring narrow construction of FOIA exemptions . . . [and] ha[d] no basis in the text, context, or purpose of FOIA." *Id.* at 579–580.

Thus, if this Court were to discard the *National Parks* test, it should implement a new standard that will embody FOIA's "strong presumption in favor of disclosure" in a manner similar to *Milner*. *See Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quoting *Rose*, 425 U.S. at 361).

B. *Mink* Confirms That Any Test Must Be Tied To The Harms Attributable To Disclosure.

The story of *Mink* shows that Congress did not intend for the judiciary to abdicate its powers of review and rubberstamp the Executive's—or the private sector's—determination that information ought to be withheld. Judicial scrutiny in the context of Exemption 4 requires this Court to give meaning to the 1974 amendments enacted after *Mink*, and to recognize Congress's "inten[t] that the judicial branch have the discretion to weigh the danger . . . [of] disclosure and to question the propriety of executive branch action in classifying a given document, rather than rely on an executive branch classification of the requested record." *S. Comm. on the Judiciary, 95th Cong., Rep. on Oversight Hearings: Agency Implementation of the 1974 Amendments to the Freedom of Information Act*, at 17

(Comm. Print 1980). In recognition of these principles, any new standard that this Court crafts should—in the interest of promoting transparency and disclosure—avoid a "hypertechnical definition" of "confidential," Pet. Br. at 19–20, that allows the government (or a private party) to unilaterally decide what is deemed confidential.

Lower courts reacted to *Mink* by building off the *in camera* and *de novo* review provisions in FOIA. § 552(a)(4)(B); *see, e.g.*, *Allen v. Cent. Intel. Agency*, 636 F.2d 1287, 1299–300 (D.C. Cir. 1980), *overruled on other grounds by Founding Church of Scientology of D.C. v. Smith*, 721 F.2d 828, 830 (D.C. Cir. 1983); *Donovan v. Fed. Bureau of Invest.*, 806 F.2d 55, 59–60 (2d Cir. 1986), *abrogated on other grounds by Dep't of Justice v. Landano*, 508 U.S. 165, 179–180 (1993). These courts recognized the importance of *in camera* and *de novo* review as articulated by Congress, first, because of the inherent information asymmetries between the FOIA requester and the government, and second, because "no other party or institution" apart from the court is "available to ensure that the [government's] assertions are reliable." *See Jones v. Fed. Bureau of Invest.*, 41 F.3d 238, 242–243 (6th Cir. 1994). Indeed, *Jones* explicitly recognized the powerful incentives for agencies to resist disclosure even when disclosure is proper should the information reveal agency misconduct or contain otherwise embarrassing content. *Id.*

The Supreme Court agreed with this reasoning in *Department of Justice v. Landano*, an Exemption 7(D) case Petitioner misreads in support of its interpretation of "confidential." Pet. Br. 19–21. Just as Petitioner argues for a universal definition of "confidential" that "means all such information that is kept private and not publicly

disclosed," *id.* at 21–22, the government in *Landano* similarly argued for a universal rule that all sources for law enforcement should be deemed "confidential," 508 U.S. at 173–175. The Court rejected the government's argument, finding that even though it "may be true that many, or even most, individual sources will expect confidentiality," there was "no explanation, other than ease of administration, why that expectation always should be presumed." *Id.* at 176. The Court found such reasoning "conclusory" and also accounted for considerations of "fairness" that "counsel[ed] against the [g]overnment's rule." *Id.* The Court emphasized that the government's proposed approach in *Landano* for confidential sources was tantamount to creating a "sweeping presumption" that neither "comport[ed] with 'common sense [nor] probability.'" *Id.* at 175 (internal citations omitted).

The same holds true for Petitioner's sweeping presumption here: "Given the wide variety of information that such institutions may be asked to provide," Petitioner's standard "though rebuttable in theory, is in practice all but irrebuttable" because "the requester—who has no knowledge about the particular source or the information being withheld—very rarely will be in a position to offer persuasive evidence that the [submitter] in fact had no interest in confidentiality." *Id.* at 176–177. Instead, a "more particularized approach is consistent with Congress' intent to provide 'workable rules' of FOIA disclosure." *Id.* at 180 (collecting cases). Rather than a "prophylactic rule," to "the extent the [g]overnment[]" could substantiate actual harm flowing from disclosure by introducing sworn affidavits or declarations from someone with personal knowledge, the government could still "attempt to meet its burden." *Id.* Further, these affidavits

have to be tethered to *policy justifications* for keeping the information confidential—in the context of Exemption 7(D) justifications "such as the nature of the crime that was investigated and the source's relation to it." *Id.* "[A]rmed with this information, the requestor [would] have a more realistic opportunity" to argue the information was not, in fact, confidential. *Id.*

Accordingly, to vindicate FOIA's goal of broad disclosure, any new standard should require the government to propound real-world policy justifications for keeping information confidential—justifications that cannot be premised solely on ease of administration or on a theoretical definition divorced from the harm that flows from disclosure. As discussed *supra*, "Congress intended [Exemption 4] to protect . . . financial or commercial information that is privileged and confidential," and in so doing requires agencies to "balance the competitive interest of a business against the public's right to know vital health, safety, economic, and legal information." *S. Comm. on the Judiciary, 95th Cong., Rep. on Oversight Hearings: Agency Implementation of the 1974 Amendments to the Freedom of Information Act*, at 3 (Comm. Print 1980).

Thus, to prevail on an Exemption 4 case, the government should present evidence of non-speculative, non-conclusory harms to a third party that would result from disclosure. Included in this evidence should be a declaration from someone with personal knowledge of the relevant market conditions. Requiring personal knowledge tracks not only existing Exemption 4 case law, *see, e.g.*, *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976) (concluding that Exemption 4 witness

testified based on "conjecture," not "personal knowledge"), but also the 2016 FOIA amendments discussed below. It also complies with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Fed. R. Civ. P. 56(c)(4) ("A[] . . . declaration used to support or oppose a motion . . . must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated."); Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Requiring evidence of non-speculative, non-conclusory harms and a declarant with personal knowledge will properly balance FOIA's broad purpose of disclosure and the competitive interests that a third party possesses in its information.

III. This Case Predates A Major Amendment To The Text Of FOIA In The Form Of The FOIA Improvement Act Of 2016.

This case predates a major amendment to the text of FOIA in the form of the FOIA Improvement Act of 2016. Pub. L. No. 114-185, 130 Stat. 538 (2016).[6] Thus, this Court need not even decide the case and should dismiss the writ as improvidently granted. In the alternative, at

6. The parties barely noted the amendments because they do not apply to this case. By express text, the amendments "apply to any request for records under section 552 of title 5, United States Code, made after the date of enactment of this Act." FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 6, 130 Stat. 538 (2016). President Obama signed the amendments into law on June 30, 2016, more than five years after Argus Leader submitted the FOIA request at issue here. *See* J.A. at 41.

the very least this Court should clarify in its opinion that its decision has no bearing on the "foreseeable harm" standard because it is not before this Court and any potential decision in this case only risks confusing lower courts for minimal real world effect.

The FOIA Improvement Act of 2016, among other things, codified a "foreseeable harm" standard that is required to withhold information. § 552(a)(8)(A). In pertinent part, the amendment states:

> An agency shall—(i) withhold information under this section only if—(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law.

Id. By its plain terms, the foreseeable harm standard applies to all discretionary exemptions to FOIA, of which Exemption 4 is one per *Chrysler*; *see also* Pet. Br. at 33–34; Br. of U.S. at 32. Congress codified the foreseeable harm standard in 2016, after that standard was long the policy of the Department of Justice ("DOJ") under the Clinton and Obama administrations.[7] As policy, this was subject to change across administrations, so Congress "[b]uil[t]

7. *See* Memorandum from Eric Holder, Att'y Gen. of the U.S., to Heads of Dep'ts & Agencies Regarding the Freedom of Information Act (Mar. 19, 2009), https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf [https://perma.cc/ZC3U-ENDW]; Memorandum from Janet Reno, Att'y Gen. of the U.S., to Heads of Dep'ts & Agencies (Oct. 4, 1993), http://www.fas.org/sgp/clinton/reno.html [https://perma.cc/5BPU-K4R6].

on the [Obama] Administration's efforts" by "codify[ing] the presumption of openness, making it a permanent requirement for agencies, with respect to FOIA." H.R. Rep. No. 114-391, at 9 (2016).

Indeed, the legislative history of the 2016 FOIA amendments reveals a congressional preference to codify a standard at least as exacting as that in *National Parks*. During House debates, members clarified that this "presumption of openness" is linked to the "foreseeable harm" standard because it requires agencies to "compl[y] with the spirit of the law," rather than exercise rigid adherence to the "letter of the law." 162 Cong. Rec. H3717 (daily ed. June 13, 2016). As such, the foreseeable harm standard was the "most important" reform of the Act because it "put[] that spirit into the letter of the law." *Id.* Agencies may thus no longer withhold information "that is embarrassing or could possibly paint the agency in a negative light simply because an exemption may technically apply" and now must "first determine whether they [can] reasonably foresee an actual harm." *Id.* Thus, agencies must now "err on the side of transparency" and end the practice of "withhold[ing]-because-[they]-want-to." *Id.*

I. This Court should not address the scope of the 2016 amendments because the issue is not before it and has not been properly briefed. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 679 (2016) (Roberts, C.J., dissenting) ("If either the plaintiff or the defendant ceases to have a concrete interest in the outcome of the litigation, there is no longer a live case or controversy. A federal court that decides the merits of such a case runs afoul of the prohibition on advisory opinions."); *Snyder v. Phelps*, 562

U.S. 443, 449 n.1 (2011) (Roberts, C.J.) ("The epic is not properly before us and does not factor in our analysis . . . Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic. Given the foregoing and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case."). As mentioned *supra* note 6, Petitioner's merits brief, while excerpting the 2016 foreseeable harm standard, does not discuss it at all. *See* Pet. Br. at 2.

Indeed, the applicability of the foreseeable harm standard on Exemption 4 raises a distinct issue from that discussed in Petitioner's merits brief. Allowing these questions to percolate in the lower federal courts will help the Court understand the impact of the case before it. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., concurring in the denial of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). Therefore, this Court should wait until lower federal courts consider these questions and take a case in the future offering a better vehicle for them.

II. Because this case precedes the 2016 FOIA amendments, it only has the potential to affect nine cases.[8]

8. To find these cases, *amici* conducted three different searches for dockets on Bloomberg Law, a database that draws from PACER, and vetted the populated cases for relevance. The first search was for all open cases, in a federal circuit or district court, filed between January 1, 1966 and present, and for the keyword "552(b)(4)." This search yielded 150 dockets. The second search was for all open cases, in a federal circuit or district court,

The reason it would affect so few cases is because the foreseeable harm standard parallels (if not surpasses) the pro-disclosure nature of the *National Parks* test. Therefore, defining the term "confidential" under Exemption 4 will be inconsequential to FOIA requests that post-date codification of the foreseeable harm standard because agencies and lower courts will have

---

filed between January 1, 1966 and present, for the keyword "Exemption 4," and limited to FOIA cases (as segregated by Bloomberg, which marks cases based on the cover sheet of the complaint). This search yielded 77 dockets. The third search was for all open cases, in a federal circuit or district court, filed between January 1, 1966 and present, for the keywords "commercial business information," "commercial confidential information," "National Parks," or "trade secrets," and limited to FOIA cases (as segregated by Bloomberg, per the above). This search yielded 78 dockets. There was considerable overlap of cases in the search results. *Amici* then vetted for relevance, determined by (1) the date of the FOIA request; and (2) the underlying issue in the case. Relevant cases were those with FOIA requests pre-July 1, 2016 and those where confidential commercial information and Exemption 4 were in dispute. Only nine cases met these standards. *See Am. Small Bus. League v. Dep't of Defense*, No. 3:18-CV-01979 (N.D. Cal. Mar 30, 2018); *King & Spalding, LLP v. Dep't of Health & Human Servs.*, No. 1:16-cv-01616 (D.D.C. Aug. 9, 2016); *Humane Soc'y Int'l v. Dep't of Fish & Wildlife Servs.*, No 1:16-cv-00720 (D.D.C. Apr. 18, 2016); *Climate Investigations Ctr. v. Dep't of Energy*, No. 1:16-cv-00124 (D.D.C. Jan. 26, 2016); *Judicial Watch, Inc. v. Dep't of State*, No. 1:15-cv-00687 (D.D.C. May 6, 2015); *Org. for Competitive Markets v. Office of Inspector Gen.*, No. 1:14-cv-01902 (D.D.C. Nov. 12, 2014); *Seife v. Food & Drug Admin.*, No. 1:15-cv-05487 (S.D.N.Y. Jul. 14, 2015); *Project on Predatory Student Lending of the Legal Servs. Ctr. of Harvard Law School v. Dep't of Justice*, No. 2:17-cv-00210 (W.D. Pa. Feb. 14, 2017); *Texas Retailers Ass'n v. Dep't of Agric.*, No. 1:18-cv-00659 (W.D. Tex. Aug 6, 2018).

to engage in a *National Parks*-type analysis, whether through the term "confidential" or through the foreseeable harm standard. The source of law is a distinction with little difference, and such a distinction should not be made when (a) the cost of doing so would be to confuse lower courts on the applicability of the foreseeable harm standard on Exemption 4; and (b) the benefit of doing so could be to affect only nine cases. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.").

This is a unique case, involving a FOIA request made prior to codification of the foreseeable harm standard, *see* J.A. at 41; a stipulation that the withholdings included commercial or financial information, *Argus Leader Media v. Dep't of Agric.*, 224 F. Supp. 3d 827, 832 (D.S.D. 2016); a dispute over whether that information was confidential under Exemption 4, *Argus Leader Media v. Dep't of Agric.*, 889 F.3d 914, 915 (8th Cir. 2018); an agency that declined to defend the district court's decision regarding the confidential information on appeal, *id.* at 916; and a brief by the United States in this Court stating the agency intended to release the information despite Exemption 4, but not under an agency-specific statute, 7 U.S.C. § 2018(c), U.S. Br. at 26, 35, that the Eighth Circuit held did not prohibit disclosure, Resp. Br. at 2. "[B]ecause the present case is so unique, it is hard to see how it meets [this Court's] stated criteria for granting review." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1515 (2018) (Alito, J., dissenting); *see also Rogers v. United States*, 522 U.S. 252,

258–259 (1998) (dismissing case as improvidently granted because question presented was not what it appeared to be in petition for certiorari and did not present an important question of federal law).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Eighth Circuit Court of Appeals, dismiss the writ as improvidently granted, or clarify that its opinion does not reach the FOIA Improvement Act of 2016.

Respectfully submitted,

Michael C. Dorf
Counsel of Record
Cortelyou C. Kenney
Mark H. Jackson
Caitlin M. Foley
Cornell Law School
First Amendment Clinic
Myron Taylor Hall
Ithaca, NY 14853
(607) 255-3890
michaeldorf@cornell.edu

March 25, 2019

Counsel for Amici Curiae

APPENDIX

APPENDIX

The amici are legal scholars specializing in FOIA and the First Amendment. They have substantial expertise in issues directly affected by the outcome in this case. These amici are listed below. Institutional affiliations are listed for identification purposes only.

Ashutosh A. Bhagwat, Martin Luther King, Jr. Professor of Law, University of California, Davis School of Law.

Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School.

Heidi Kitrosser, Professor of Law, University of Minnesota Law School.

Seth F. Kreimer, Kenneth W. Gemmill Professor, University of Pennsylvania School of Law.

Margaret B. Kwoka, Associate Professor with Tenure, University of Denver Sturm College of Law.

James O'Reilly, Retired Professor, University of Cincinnati College of Law.

Richard Peltz-Steele, Professor, University of Massachusetts School of Law, Dartmouth.

Nelson Tebbe, Professor of Law, Cornell Law School.